(12)

No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioners,

v.

MANUFACTURING TECHNOLOGIES, INC.
an Oklahoma corporation,

Respondents.

On Writ Of Certiorari To The Court Of Appeals, Division I, For The State Of Oklahoma

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE MASHANTUCKET PEQUOT TRIBE, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the Cheyenne-Arapaho Tribes of Oklahoma, The Mashantucket Pequot Tribe and the National Congress of American Indians.

The Cheyenne-Arapaho Tribes of Oklahoma are organized under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, with a governing body called the Cheyenne-Arapaho Business Committee (hereinafter the "Tribes"). The United States holds 10,405 acres of land located in Custer County, Oklahoma in trust for the benefit of the Tribes. The United States also holds 67,000 acres in trust for individual tribal members.

Tribal enrollment in 1993 was 10,173. Four thousand seven hundred twenty seven (4,727) members reside within the original 1869 reservation area and an additional 2,833 members live outside that area, but within the state of Oklahoma. In 1987, unemployment of Tribal members in the jurisdiction area was sixty-one (61) percent, and sixty-four (64) percent of the Tribal households participated in food stamp or commodity distribution programs. In 1990, the average annual personal income for adult tribal members in the Tribes' service area was $6,042. The mean age of Tribal members was 24.1 years,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and counsel for Respondent have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

and eighty-five (85) percent of tribal households had children under the age of eighteen. The average education level was 11.6 years; three months below the average education level in the state.

The Tribes own the Lucky Star Bingo Enterprise and several small businesses, all situated on trust lands. These businesses are operated pursuant to management agreements which contain limited waivers of immunity from suit for the enterprise in Tribal Court. There is no waiver of immunity for the Tribe.

The Mashantucket Pequot Tribe is a federally-recognized tribe governed by the Mashantucket Pequot Tribal Council pursuant to the Tribe's Constitution and By-Laws. The Mashantucket Pequot Reservation is comprised of 2,100 acres located in southeastern Connecticut around the town of Mashantucket. In addition, the Tribe owns off-Reservation property and tribal businesses. There are approximately 350 members of the Tribe who reside on or near the Reservation.

The Mashantucket Pequot Tribe has, since 1992, operated the Foxwood Casino Resort on its Reservation, pursuant to Final Mashantucket Pequot Gaming Procedures (Gaming Procedures) approved by the Secretary of the Interior on May 31, 1991. The Tribe and the Casino together employ about 12,500 people. The Tribe has, pursuant to the Gaming Procedures, adopted the Mashantucket Pequot Sovereign Immunity Ordinance [1 Mashantucket Pequot Tribal Laws (M.P.T.L.), Title IV, Chapter 1, "Tort Claims"] which waives the immunity of the Tribe from suit for claims arising from alleged injuries

to patrons of its Casino, and has established a Tribal Court with a Gaming Division to hear all such claims.

The Mashantucket Pequot Tribe has also waived its immunity from suit in both civil and contract actions for the alleged torts of tribal employees and agents apart from the Casino, and for actions arising out of contracts to which the Tribe is a party. It is, moreover, the written policy of the Tribe, and direction in all insurance policies which it purchases, that the defense of tribal sovereign immunity may not be interposed to avoid liability in any action brought for a claim arising outside the Reservation for which coverage applies. Off-reservation enterprises owned by the Tribe are incorporated under the laws of the State of Connecticut and subject themselves to state law and regulation. The Tribe has not, however, generally waived its immunity for those activities which it undertakes as a sovereign with nonmembers outside of Indian Country.

The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

Amici have a vital interest in this case, which adversely affects tribal sovereignty for tribes nationwide. The Tribes and the members of NCAI are all involved in efforts at economic development, and many of these efforts involve conducting business outside of Indian

Country. It makes a huge difference in the conduct of such business if tribes lose their immunity from suit simply by virtue of leaving the reservation. The issue of sovereign immunity is a legitimate issue for contract negotiation, but it is an illegal infringement on tribal sovereignty for a state court to abrogate the tribes' immunity.

If the position of the Oklahoma courts in the Kiowa cases are upheld the States could supplant the role of Congress as the arbiter of the sovereign powers of tribes. Moreover, the state court order which allows for seizure in this case of federal funds for tribal programs violates the Congressional policy of furthering tribal self-government, self-sufficiency and economic development, and frustrates the fulfillment of federal programs for Indians.

SUMMARY OF THE ARGUMENT

Indian tribes are sovereign entities with all inherent powers of sovereignty which have not been taken away. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Sovereign immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). From the very beginning of this Court's handling of the issue of tribal sovereign immunity, such immunity has been viewed as supported by federal law and policy, *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) *(Fidelity Guaranty)*, and waivable only by Congress, or by the Tribes themselves, *Turner v. United States*, 248 U.S. 354, 358 (1919),

Puyallup Tribe, Inc. v. Department of Game of State of Wash., 433 U.S. 165, 167 (1977). Waivers of tribal immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 199 (1976).

The federal policy has long been that tribal sovereign immunity is an important part of Congress' "goal of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (quoting from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)). Congress has in some limited situations waived the sovereign immunity of Tribes but has not done so here.

States may not abrogate the sovereign immunity of Indian tribes, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 87. , 891 (1986). The Oklahoma Courts have mistakenly viewed the question of tribal sovereign immunity as a question of state law and have ignored the unique status of Indian Tribes within the federal system. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782 (1991).

ARGUMENT

I. AS INHERENT SOVEREIGNS, INDIAN TRIBES HAVE SOVEREIGN IMMUNITY FROM SUIT WHICH THEY CAN WAIVE, BUT ONLY CONGRESS CAN ABROGATE; SOMETHING CONGRESS HAS DONE IN ONLY LIMITED CIRCUMSTANCES NOT APPLICABLE HERE

A. Indian Tribes Have Inherent Sovereignty And Corresponding Immunity From Suit

Indian Tribes are sovereign governments "retain[ing] some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled North America." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Tribes retain all the inherent powers of a sovereign except as abrogated by Congress.

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (sic) (emphasis in original). . . . "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a good deal more than 'private, voluntary organizations. . . . ' " The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (citations omitted).

Limited aspects of sovereign immunity have been lost as a "necessary result of [Tribes'] dependent status." *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (criminal jurisdiction over non-Indians). *See, e.g., Johnson v. M'Intosh*, 21 U.S. (Wheat) 543 (1823) (the power to dispose of their lands at their own will, to whomsoever they pleased); *Cherokee Nation v. Georgia*, 30 U.S. (Pet.) 1 (1831) (the power to make treaties with foreign nations other than the United States).

In sharp contrast to these limited areas of lost sovereignty, sovereign immunity from suit has been viewed as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (*Santa Clara*) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). This sovereign immunity stems for the tribe's own sovereignty and is not dependent on a grant from Congress. It has been recognized by the Supreme Court in its early cases. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940); in *Turner v. United States*, 248 U.S. 354, 358 (1919). *See also, Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (1895). And the doctrine has been repeatedly confirmed in modern cases. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (*Potawatomi*); *Santa Clara, supra*; and *Wold, supra*.

This Court has repeatedly held that tribal sovereign immunity extends to tribal commercial enterprises which deal with nonmembers, even when it is a state which sues. *Blatchford v. Native Village of Noatak and Circle Village*,

501 U.S. 775, 782 (1991), *citing Potawatomi*. In *Potawatomi* the Tribe owned a convenience store, located on trust land, which marketed cigarettes to nonmembers. The State of Oklahoma sought to recover $2.7 million from the Tribe for taxes on sales to nonmembers. This Court held that the State of Oklahoma could require the Tribe to collect the State's taxes from nonmembers for future sales, but the State was barred by the Tribe's sovereign immunity from obtaining a money judgment against the Tribe for unpaid past taxes. *Potawatomi*, 498 U.S. at 510.

B. Only Congress Can Abrogate A Tribe's Immunity From Suit And It Has Not Done So Here

1. Congress Has Exclusive Authority Over Indian Affairs And It Alone May Abrogate Tribal Sovereign Immunity.

The Constitution delegates to the Congress the power to "regulate commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl.3. This Court has acknowledged this delegation, holding that the "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Congress has likewise expressly acknowledged this power and responsibility. *See, e.g.*, Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101(3) ("[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with

Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people").

Tribal immunity from suit, like all other aspects of tribal sovereignty, is subject to the superior and plenary control of Congress. This Court has repeatedly held that if the common-law sovereign immunity of tribes is to be limited, it is for Congress to do so. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991); *see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authority, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Turner v. United States*, 248 U.S. 354, 358 (1919) ("without authorization from Congress, the [Creek] Nation could not have been sued in any court; at least without its consent."). Waivers of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, *quoting from United States v. Testan*, 424 U.S. 392, 194 (1976).

In the treatment of their sovereign immunity from suit, Tribes are more similar to foreign sovereigns than to States. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, (1991).

> The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not the latter, implicit. What makes the State's surrender of immunity from suit by sister

> States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.

Id. at 782.

For foreign sovereigns it is the political branches of the federal government which address the status of their sovereign immunity. Congress has exercised this power to limit the immunity of both foreign powers and tribal governments. In adopting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, Congress subjected foreign sovereigns to liability for commercial activities. *See, e.g., Republic of Argentina v. Weltover Inc.*, 504 U.S. 607 (1992). Congress enacted a policy already put in place by the United States Department of State. That policy was viewed as binding on the courts under the principle that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). In like manner it is for Congress to determine the immunity of Tribes. *Blatchford*, 501 U.S. at 782.

2. Congress Has Visited the Issue of Tribal Sovereign Immunity Numerous Times and Has Made Only Limited Exceptions To It

This Court recognized Congress' commitment to continued protection of tribal sovereign immunity in rejecting Oklahoma's invitation "to construe more narrowly, or to abandon entirely, the doctrine of tribal sovereign immunity" in *Potawatomi*, and observed that

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine. *See, e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et sequitur*. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Potawatomi, 498 U.S. at 510.

Numerous other statutes express Congress' commitment to tribal sovereignty, economic development, and sovereign immunity. *See, e.g.*, Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(2) ("The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . . "); *see, e.g.*, the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450n(1) ("Nothing in this subchapter shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe").

Congress has enacted waivers of the immunity of tribal governments or their officials when it deemed such waiver appropriate. *See, e.g.*, The Indian Civil Rights Act of 1968, 25 U.S.C. § 1303 (ICRA) ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.")[2]; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (allowing "citizen" suits against any "person" – defined to include Indian tribes as "municipalities," 42 U.S.C. § 6903(13)(A) – alleged to be in violation of the Act.); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(c)(3)(A)-(B) (1988) (providing for a waiver of tribal immunity to the extent of insurance purchased to cover tribal business activities carried out pursuant to the Act, but limiting the waiver to exclude prejudgment interest, punitive damages, or "any other limitation on liability imposed by the law of the State in which the alleged injury occurs.");[3] the Native American

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[2] The ICRA was narrowly construed to exclude actions for money damages against the Tribe or its officials out of concern for both tribal sovereignty and the potential economic impact on Tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 64-65 and n. 19, 67 (discussing feared impact on Tribe of allowing suits for damages).

[3] The entire text of these subsections provides:

> (A) Any policy of insurance obtained or provided by the Secretary [of the Interior] pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.
>
> (B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

25 U.S.C. § 450f(c)(3)(A)-(B) (1988).

Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4115(c)(4)(B) (providing for a limited waiver of tribal immunity when the tribal official "is authorized and consents on behalf of the tribe and such officer to accept the jurisdiction of the federal courts for the purpose of enforcement of the responsibilities of the certifying officer as such an official.").

Congress has, moreover, provided federal legislative vehicles for tribes to establish business enterprises under federal charters with the option to adopt "sue and be sued" clauses which would waive any immunity otherwise available to these enterprises. *See,* Indian Reorganization Act (IRA), 25 U.S.C. § 477; and for Oklahoma tribes, the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 504-505 (1936). Such business entities are viewed as separate from the sovereign entity. *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. State of Okla. ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989); *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (1982). The absence of any express waiver to sue a tribal government organized under section 3 of the OIWA (or

section 16 of IRA) reinforces the conclusion that those governments remain protected by the established rule of sovereign immunity.[4]

Congress has legislated widely in the arena of tribal sovereignty, and tribal sovereign immunity. It knows how to waive tribal immunity and has done so with great particularity, e.g., n. 3 *supra*. Great care in this arena is exactly what is required. "Crafting a workable waiver statute, which maintains a sufficient amount of immunity while permitting maximum advantages for the tribal business, requires careful planning." Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 Vir. L. Rev. 1345 (Sept. 1993). Congress is, of course, in a far better position than the judiciary to decide when and if to adjust federal policy on this sensitive issue and to gather the array of

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[4] This Court has never directly held that Tribes may waive their own immunity, but has intimated as much in dicta. *See, Puyallup Tribe v. Department of Game of State of Wash.*, 433 U.S. 165, 173 (1977) ("Respondent does not argue that either the Tribe or Congress has waived [the Tribe's] claim of immunity. . . . "); *Turner v. United States*, 248 U.S. 354, 358 (1919) ("Without authorization from Congress, the [Creek] Nation could not have been sued in any court; at least without its consent."). At least five circuits have recognized waivers by tribes. *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970). For those doing business with a tribal government or one of its instrumentalities, the issue of immunity to suit is a legitimate issue for negotiation.

information necessary to craft the sort of detailed scheme necessary to adequately protect all interests and take into account individual tribal differences.[5]

C. Tribal Sovereign Immunity Applies Outside of Indian Country

Tribal sovereign immunity is not compromised by tribal activity outside of Indian Country. This Court made it clear in *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 167 (1977), that a plaintiff cannot circumvent a Tribe's immunity from suit by alleging that the conduct on which the suit is based had an off-reservation impact. In *Puyallup*, the Tribe challenged, on sovereign immunity grounds, a state court judgment purporting to exercise jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation. This Court held that sovereign immunity of the Tribe was a sound basis upon which to vacate those portions of the state court order that involved relief against the Tribe without distinction between the Tribe's on or off reservation activities. *Puyallup*, 433 U.S. at 173.

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[5] Given Congress' strong support of sovereign immunity as set out above, the question of whether the Court might at some previous time have had the authority to set aside the "federal common law" doctrine of sovereign immunity is probably moot, *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (federal common law preempted by Congressional scheme). *Cf., United States v. Kimbell Food Inc.*, 440 U.S. 715, 738 (1979) (" . . . in fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.").

To the same effect is *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). There the Tribe went off its Reservation to bring suit in North Dakota state court against a nonmember contractor for negligence and breach of contract. The North Dakota Supreme Court ruled that Chapter 27-19 of the North Dakota Century Code conditioned tribal access to state court on the Tribe's waiver of its immunity to have any civil disputes in state court to which it is a party adjudicated under state law. This Court held that the State did not have the power to impose such a condition. This Court noted that "the State's interest in requiring that all of its citizens bear equally the burdens and the benefits of access to the courts is readily understandable. But here, federal interests exist which override this state interest." *Id.* at 888. The Court went to say that "This result simply cannot be reconciled with Congress' jealous regard for Indian self governance. '[B]oth the tribes and the federal government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.' " *Id.* at 889 (citations omitted). Finally the Court held that the State's action

> serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. . . . And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-91 (1986) (citations omitted).

In addition, in *Potawatomi, supra*, the Court distinguished between state regulatory jurisdiction to require Tribes to collect a tax and its lack of ability to enforce any obligation because of the Tribe's sovereign immunity. While *Potawatomi* occurred within Indian Country, it clearly stands for the proposition that even in those situations where state regulatory jurisdiction applies to some extent, sovereign immunity persists. *Potawatomi*, 498 U.S. at 510.

II. THE OKLAHOMA COURTS HAVE IGNORED GOVERNING FEDERAL LAW DEFINING THE UNIQUE STATUS OF INDIAN TRIBES IN THE FEDERAL SYSTEM

The Oklahoma courts have presumed to displace the role of Congress by deciding that it is within their "inherent concurrent jurisdiction" to determine the extent of tribal sovereign immunity where a tribe enters into a commercial transaction outside of Indian Country. *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 61 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996) (*Hoover*). The Oklahoma Court of Appeals in this case relied on the decision of the Supreme Court of Oklahoma in *Hoover*. The facts in *Hoover* are essentially the same as the present case, involving the Kiowa Tribe, and arising out of the same transaction. In *Hoover* the Oklahoma Supreme Court rested its decision on the reasoning of the Supreme Court of New Mexico in *Padilla v. Pueblo of Acoma*, 754 P.2d 845

(1988), *cert. denied*, 490 U.S. 1029 (1989). In *Padilla* the court reasoned that the decision whether to recognize the sovereign immunity of an Indian tribe was "solely a matter of comity." 754 P.2d at 850. It reached this result through reliance on this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), *reh. den.*, 441 U.S. 917 (1979). In that case California's courts asserted jurisdiction over the State of Nevada based on the conduct of an employee of Nevada (an automobile accident) while in California. This Court found that California could determine whether and on what terms to accord its sister states immunity from suit in its courts because the constitutional compact leaves the several states free to do so. It was the mutuality of this concession among the states in the compact that allows each, as a matter of local policy and comity, to determine the immunity it will accord the other. "What makes the State's surrender of immunity from suit by sister States plausible is the mutuality of that concession." *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782 (1991).

The error in the reasoning of the court in *Padilla*, and therefore by extension the Oklahoma courts, is in treating Indian tribes as states. The difference between states and tribes was addressed by this Court where it upheld the sovereign immunity of the State of Alaska against suit by an Indian Tribe.

> The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity [from suit] was for the former, but not for the latter, implicit. What makes the State's surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, *Potawatomi Tribe, supra*, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the *tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 782 (1991) (emphasis in original). The determination of tribal immunity is not, therefore, a matter of comity for each State to decide. Rather, as this Court has repeatedly held, if the common-law sovereign immunity of tribes is to be limited, it is for Congress to do so. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and cases cited there.

The weight of authority in the lower federal courts supports sustaining tribal sovereign immunity. Every federal court which has addressed the issue of tribal sovereign immunity with nonmembers outside of the tribe's jurisdiction has sustained the tribal immunity to suit. *In re Greene*, 980 F.2d 590 (1992), *cert. denied, sub nom. Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063-1065 (1995), *cert. denied*, 116 S.Ct. 57 (1995); *Frederico v. Capital Gaming Intern., Inc.*, 888 F.Supp. 354, 357 (D.R.I. 1995); *Elliott v.*

Capital Intern. Bank & Trust, Ltd., 870 F.Supp. 733, 735 (E.D. Tex 1994), *aff'd*, 102 F.3d 549 (5th Cir. 1996).[6]

Except for Oklahoma, and New Mexico, no state court has presumed to take jurisdiction over a sovereign Indian tribe without its consent or in the absence of a congressional act expressly conferring jurisdiction. Those states, other than Oklahoma and New Mexico, that have addressed the issue of tribal immunity in dealings with nonmembers outside of the tribe's jurisdiction have kept faith with the rulings of this Court and upheld tribal immunity from suit in their state courts. *See, e.g., North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (*en banc*); *Gavle v. Little Six, Inc.*, 555 N.W. 2d 284, 290 (Minn. 1996), *petition for cert filed*, 65 U.S.L.W. 3539 (Jan. 29, 1997); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *S. Unique, Ltd. v. Gila River*

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[6] In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh. den.*, 450 U.S. 960 (1981) the Tenth Circuit found that Congress had provided a waiver of the tribes' immunity in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 *et seq.* for an action for money damages brought under the Act by a nonmember who had no remedy in a tribal forum. That result appears to be squarely at odds with *Santa Clara Pueblo*, which held that suits against a Tribe under the ICRA are barred by sovereign immunity, 436 U.S. at 58-59. *Dry Creek Lodge* has, moreover, not been followed by the Tenth Circuit or other courts. Subsequent decisions of the Tenth Circuit have described *Dry Creek Lodge* as "an exception this court has narrowly construed." *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 892 (10th Cir. 1989), *citing White v. Pueblo of San Juan*, 728 F.2d 1307, 1312-13 (10th Cir. 1984); and *Ramey Constr. Co. v. Mescalero Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982).

Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. App. 1983); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971); *But cf. Dixon v. Picopa Const. Co.*, 772 P.2d 1104 (Ariz. 1989) (which utilizes Arizona's "subordinate economic organization" test to avoid finding waiver of tribal sovereign immunity).

CONCLUSION

For the reasons stated above, the decision of the Oklahoma Court of Appeals should be reversed.

DATED this 25th day of August, 1997.

Respectfully submitted,

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